Supreme Court, U.S.
FILED

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No. ____

IN THE

Supreme Court of the United States

DANIEL G. BARRY,
Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

On Petition for Writ of Certiorari
To The Illinois Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Does a state circuit court deprive a criminal defendant of rights protected by the Due Process clause of the Fourteenth Amendment when it:

(a) Fails to apply a burden of proof to overcome the application of collateral estoppel;

(b) Arbitrarily relies on an inapposite case; and

(c) Fails to render a ruling based on any public policy balancing or evidentiary analysis.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 4

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

CONCLUSION 15

APPENDIX A. Summary Order of the Appellate Court of Illinois, Second District 1a

APPENDIX B. Order of the Appellate Court of Illinois, Second District, Denying Rehearing 5a

APPENDIX C. Order of the Illinois Supreme Court Denying Appeal as a Matter of Right and Denying Leave to Appeal 6a

APPENDIX D. Portions of the Record Relied Upon 7a

TABLE OF AUTHORITIES

Page

CASES

Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40 (1999) 10

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 2, 3

Daley v. Laurie, 476 N.E.2d 419 (Ill. 1985) 8

Dusenbery v. United States, 534 U.S. 161 (2002) 10

Florida v. Thomas, 532 U.S. 774 (2001) 2

Flynt v. Ohio, 451 U.S. 619 (1981) 2

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989) 2, 3

Gilbert v. Homar, 520 U.S. 924 (1997) 11

Lehr v. Robertson, 463 U.S. 248 (1983) 10

Mathews v. Eldridge, 424 U.S. 319 (1976) 10, 11

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) 11

People v. Moreno, 744 N.E.2d 906 (Ill. App. Ct. 2001) ..... passim

Pierce County v. Guillen, 123 S. Ct. 720 (2003) 2

Smith v. Doe, 123 S. Ct. 1140 (2003) 10

Wolff v. McDonnell, 418 U.S. 539 (1974) 10

STATUTES

28 U.S.C. § 1257(a) 1

705 ILL. COMP. STAT. 405/2-3(1)(b) 7

720 ILL. COMP. STAT. 5/12-4.3 5
720 ILL. COMP. STAT. 5/12-4.3(a) 5, 10
730 ILL. COMP. STAT. 5/5-8-1(a)(3) 10

OTHER AUTHORITIES

RESTATEMENT (SECOND) OF JUDGEMENTS § 28(5) 12

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, § 1 ..... 4, 10

Petitioner, Daniel G. Barry, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court, Second District.

OPINION BELOW

The opinion below is from Appellate Court of Illinois, Second District. It was not published. The case was styled *The People of the State of Illinois v. Daniel G. Barry*, No. 2-01-0497. It was entered July 25, 2002. The text of this opinion is reproduced in Appendix A.

The Illinois Supreme Court denied Defendant's Petition for Appeal as a Matter of Right or Leave to Appeal on February 5, 2003, without opinion, No. 95160, and the notice of denial is reproduced in Appendix C.

JURISDICTION

The Illinois Supreme Court denied Defendant's Petition for Appeal as a Matter of Right or Leave to Appeal on February 5, 2003, without opinion, No. 95160 (App. C, infra, 6a), and ordered a stay of the mandate pending the outcome of this Petition on March 7, 2003.

On July 25, 2002, the Appellate Court of Illinois, Second District entered its opinion and judgment (App. A, infra, 1a - 4a). A timely petition for rehearing was denied on October 9, 2002 (App. B, infra, 5a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) because a title, right, privilege, or immunity was claimed under the Constitution of the United States.

This petition arises out of the trial court's denial of Defendant's Motion to Dismiss. App. 10a-11a. Trial proceedings have been stayed pending the outcome of the appeals process. Although "[i]n a criminal prosecution, finality [as required by 28 U.S.C. § 1257(a)] generally 'is defined by a judgment of conviction and the imposition of a sentence,'" *Florida v. Thomas*, 532 U.S. 774, 777 (2001) (quoting *Fort Wayne Books, Inc. v.*

Indiana, 489 U.S. 46, 54 (1989)), "[i]n certain circumstances, [the Court has] 'treated state-court judgments as final for jurisdictional purposes although there were further proceedings to take place in the state court.'" *Id.* (quoting *Flynt v. Ohio*, 451 U.S. 619, 620-621 (1981) (per curiam)); *see also Pierce County v. Guillen*, 123 S. Ct. 720, 728 (2003). The Court has defined four categories of circumstances in which it will treat state-court judgments as final in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

In the present case, the denial of Defendant's Motion to Dismiss is final under the fourth *Cox* category, namely

> those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

420 U.S. at 482-83.

The present case satisfies all of the elements of the fourth *Cox* category. First, since the Illinois Supreme Court has denied appeal as a matter of right and leave to appeal, the procedural due process issue decided by the Appellate Court has been finally decided by the state courts. Second, because the trial has yet to proceed, Defendant might prevail on the merits on nonfederal grounds. Third, a reversal of the Illinois Appellate Court on the procedural due process issue would preclude any further litigation in the criminal proceedings against Defendant. If this Court were to reverse the Illinois

Appellate Court on the grounds that the trial court denied Defendant his right to procedural due process, the trial court would then be forced to render a new judgment on Defendant's Motion to Dismiss. Procedural due process would require that the new judgment expressly address three matters not previously addressed in the trial court's denial of the Motion to Dismiss: (1) the burden placed upon the State to overcome the application of collateral estoppel, (2) the factual basis for relying on the *Moreno* case, and (3) the balance between the competing public policy interests upon which the trial court purportedly relied. Proper, procedurally sound consideration of these matters could only result in granting Defendant's Motion to Dismiss, thus precluding further litigation of this cause of action.

Finally, the present case also satisfies the fourth element of the fourth *Cox* category, namely that "a refusal immediately to review the state-court decision might seriously erode federal policy," 420 U.S. at 483. Of the cases in which the Court addressed this particular standard, only a few relied on a constitutional right as the basis for the federal policy. Of those cases, the present case is analogous to *Ft. Wayne Books v. Indiana*, 489 U.S. 46 (1989). In that case, the Court held that it had jurisdiction since the case involved a First Amendment challenge to the facial validity of the Indiana RICO statute. That challenge called "into question the legitimacy of the law enforcement practices of several States, as well as the Federal Government." 489 U.S. at 55. Likewise, this case calls into question the legitimacy of the widespread law enforcement practice of using juvenile proceedings as a "dry run" for criminal proceedings against parents. This practice was fostered by the trial court in the present case in that the court did not (1) provide a procedurally sufficient burden for the State to overcome, (2) address the facts that purportedly made *Moreno* controlling, or (3) express the balance of public policies upon which the court based its use of that exception to collateral estoppel. Hence, the

State was allowed to hide its practice behind constitutionally deficient procedural due process. This Court's jurisdiction is urgently necessary in this case to protect the same rights of similarly situated defendants in other states.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Daniel G. Barry and his wife, Toni K. Barry, have adopted T.B. and the other four children related to T.B. (R. at C.70). The five adopted children all suffer from a variety of medical and psychological conditions. (R. at C.70-73). Additionally, the Barry's have two natural children named J.B. and A.B. (R. at C.70).

On October 31, 1999, minor adopted child T.B. was injured early in the morning while trying to crawl into the top bunk of his bunk bed. The injury that resulted was a spiral fracture of his right tibia. (R. at C.65). Mr. Barry immediately took the child to Swedish American Hospital in Rockford, Illinois. (R. at C.65).

A nurse questioned Mr. Barry regarding the injury to T.B., and the Rockford Police Department was

contacted. (R. at C.3). Two Rockford Police Detectives arrived at the hospital and spoke with both the nurse and Mr. Barry. (R. at C.3, C.66). Mr. Barry was subsequently arrested and charged with Aggravated Battery of a Child and Domestic Violence. (R. at C.1, C.5, C.101).

On November 24, 1999, the Grand Jury for the Seventeenth Judicial Circuit returned a Bill of Indictment charging Defendant Barry with one count of Aggravated Battery pursuant to 720 ILL. COMP. STAT. 5/12-4.3. (R. at C.13). Thereafter, on December 9, 1999, defendant Daniel Barry pled "not guilty" to the charges. (R. at C.176). Defendant respectfully declined the State's initial plea offer, and the State's Attorney caused a Superseding Bill of Indictment to be returned on February 24, 2000, charging the Defendant with Aggravated Battery of a Child (720 ILL. COMP. STAT. 5/12-4.3(a)). (R. at C.33).

Meanwhile, on or about December 15, 1999, the State's Attorney Office for the County of Winnebago filed a series of Adjudication Petitions naming Defendant Barry and his spouse, Toni Barry, as Respondents. (R. at C.66). The Adjudication Petitions were comprised of one Abuse Petition concerning Barry minor T.B. and six Neglect Petitions premised on an "injurious environment" concerning D.B., G.B., R.B., J.B., A.B. and J.A.B. (R. at C.66-67).

On or about April 19, 2000, Defendant Daniel Barry and Respondent Toni Barry voluntarily and temporarily relinquished guardianship and custody rights of D.B and T.B.[1] (R. at C.67). After temporarily relinquishing guardianship and custody of D.B. and T.B., the Illinois Department of Children and Family Services (DCFS) directly assumed case management of the Barry family. (R. at C.67).

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[1] The psychiatric health of D.B. and T.B. had deteriorated to the extent that both minors had become a danger to the other adopted children and could not be controlled by the parents.

In the earlier stages of the juvenile proceeding, the court offered to consolidate both the juvenile and criminal case if agreed to by the Defendant and State. (R. at C.67-68). This offer was made for purposes of judicial economy and so that all issues could be fully adjudicated, given the Defendant's constitutional right not to incriminate himself because of the pendency of this criminal proceeding.

After approximately nine months of discovery exchange in the Juvenile Court case, Defendant Barry and Respondent Toni Barry filed a Motion for Summary Judgment in the juvenile proceeding, (R. at C.68), to which the State responded in opposition, followed by Defendant's Reply Brief. (R. at C.68). Prior to ruling on Defendant's Motion for Summary Judgment on December 21, 2000, both the State and Guardian *Ad Litem* restated their positions that Defendant's Summary Judgment Motion should be denied. (R. at C.68). In ruling from the bench, the judge denied Defendant's Motion for Summary Judgment for only one reason, that being neither the State nor the Defendant addressed the issue of the reasonableness of the force used to cause T.B.'s leg to break, i.e., reckless state of mind. The court then inquired whether settlement discussions had occurred. (R. at C.68).

Notwithstanding denial of Defendant's Motion for Summary Judgment, the State altogether dismissed the Neglect Petitions of A.B. and J.A.B. with prejudice. (R. at C.109). As to the Abuse Petition with regard to T.B., the State amended the petition to be that of a Neglect Petition. (R. at C.108). All remaining Petitions were amended to read as follows:

> Said minor [T.B., D.B., R.B., J.B. and G.B.] is a Neglected minor in that he/she is under 18 years of age and his/her environment is injurious to his/her welfare, in that: minor and his/her four siblings all of whom have been diagnosed as special needs children (*i.e.*,

> emotionally disturbed) were left in the sole care of the father, Daniel Barry, who had mental health problems at the time (*i.e.*, depression, which required that his medication be evaluated) and father pulled T.B. from the bed by his leg, causing the leg to break, thus placing the minor at risk of harm, pursuant to [705 ILL. COMP. STAT. 405/2-3(1)(b)].

(R. at C.68).

The court adjudicated T.B., D.B., R.B., J.B. and G.B. wards of the court for the purpose of assuring that the Barry minors would receive the services that they require from the State of Illinois. (R. at C.69). Except for those minor children presently in psychiatric institutions (T.B. and D.B.), the court also found that the Defendant and Respondent were good, fit and proper persons to care for and maintain custody of the minor children. (R. at C.69).

In the criminal case, Defendant filed his Motion to Dismiss on April 2, 2001, and it was scheduled for hearing on April 13, 2001. (R. at C.63, C.116). Thereafter, hearing was rescheduled for May 2, 2001. (R. at C.199). On April 22, 2001, Defendant filed a Memorandum in Support of Defendant's Motion to Dismiss. (R. at C.65). On May 2, 2001 Defendant filed a Supplemental Memorandum with the Circuit Clerk of the Court (R. at C.132). At the May 2, 2001 hearing, the State tendered, *instanter* in open court, a one page response to defendant's Motion to Dismiss, in which the case of *People v. Moreno*, 744 N.E.2d 906 (Ill. App. Ct. 2001) was relied upon. (R. at C.126, C.146). At the conclusion of the hearing on May 2, the court denied Defendant's Motion to Dismiss (R. at C.206) and subsequently denied Defendant's Motion to Stay Trial Pending Appeal. (R. at C.206 - C.207). The denial of the Motion to Stay Trial necessitated the filing of Defendant's Notice of Appeal on May 4, 2001. (R. at C.169).

On the date of filing Defendant's Notice of Appeal,

Defendant was scheduled for a pre-trial conference and hearing on all pending Motions in *Limine*. (R. at C.217). At the commencement of this hearing, Defendant's counsel informed the Trial Court that with the filing of Defendant's Notice of Appeal pursuant to ILL. SUP. CT. R. 604(f), jurisdiction was with the Appellate Court, based on citation to *Daley v. Laurie*, 476 N.E.2d 419 (Ill. 1985). (R. at C.217). The court asked for comment from the State, who essentially concurred with the jurisdictional analysis of Defendant's counsel. (R. at C.217-C.218). Thereafter, the court took the case off the trial calendar pending appeal resolution. (R. at C.218-C.219).

In the trial court, Defendant raised the bases for the federal issue in his Motion to Dismiss, Memorandum in Support of the Motion to Dismiss, and Supplemental Memorandum in Support of the Motion to Dismiss, those bases being namely the burden upon the State, the inapplicability of the *Moreno* case, and the need to balance competing public policies when relying upon the exception to collateral estoppel. In addition, Defendant notified the court of his intent to appeal immediately after the court ruled on the motion to dismiss, (App. at 10a), and at the final pretrial conference, (R. at C.217).

In the appellate court, Defendant specifically addressed the denial of his right to procedural due process in his Brief on Appeal. The appellate court addressed the matter, indicating that there had been no denial of procedural due process by affirming the trial court's denial of the Motion to Dismiss, and by explicitly stating that there was no need to arrive at those matters which are the bases of Defendant's procedural due process claim, namely the State's burden, the applicability of *Moreno*, and the public policy balancing. The federal issue was again raised in the petition for rehearing, which the appellate court denied.

Defendant also raised the procedural due process claim in his Petition for Appeal as a Matter of Right or Leave to Appeal. The denial of that petition by the Illinois Supreme Court effectively affirmed the opinion of

the appellate court.

REASONS FOR GRANTING THE WRIT

Defendant Daniel G. Barry was denied his right to procedural due process under Fourteenth Amendment to the United States Constitution when, in the hearing on and ruling rendered against Defendant's Motion to Dismiss, the trial court (1) failed to apply a burden of proof to overcome the application of collateral estoppel, (2) relied arbitrarily on an inapposite case to support its ruling, and (3) failed to render a ruling based on any public policy balancing or evidentiary analysis. This unconstitutionally insufficient procedure followed by the court provided a cloak of protection for the State's practice of using juvenile court proceedings as a "dry run" for criminal proceedings. The tactic allows the State to take advantage of the far less imposing protections afforded the Defendant in the juvenile court as compared to those afforded in the criminal court. Because this issue pertains to the legitimacy of the law enforcement practices of several states and the protections afforded similarly situated defendants in those jurisdictions, it is urgent that this Court review the decision of the Illinois Appellate Court in this case.

The guarantee that state government act with "procedural due process" is derived from the Due Process Clause of the Fourteenth Amendment. That clause prohibits the state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. Thus, a party must show both deprivation of a protected interest and denial of due process. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999).

In the present case, Defendant faces a deprivation of his liberty interests. The relationship between a parent and child is constitutionally protected by the Due Process Clause of the Fourteenth Amendment. *Lehr v. Robertson*, 463 U.S. 248 (1983). Clearly, conviction for

the criminal charges against the Defendant can potentially damage his relationship with his children. If Defendant were convicted, the State of Illinois would separate Defendant from his children who are still at home. Moreover, the Defendant has been charged in the instant case with a felony charge punishable by a minimum of six years in prison up to a maximum of thirty years. 720 ILL. COMP. STAT. 5/12-4.3(a); 730 ILL. COMP. STAT. 5/5-8-1(a)(3). Lawful incarceration deprives an individual of many of the rights and privileges which are available to an ordinary citizen, *Wolff v. McDonnell*, 418 U.S. 539 (1974), and imprisonment is considered the "paradigmatic affirmative disability or restraint" constituting a denial of the liberty interest sufficient to support a due process claim, *Smith v. Doe*, 123 S. Ct. 1140, 1151 (2003). Accordingly, a deprivation of Defendant's liberty interests is implicated in this case.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court defined a balancing test to weigh whether a particular set of procedures is warranted, considering its costs in relation to the benefits that would be derived from the use of such procedures. Although this Court has held that the *Mathews* test does not apply in certain contexts, the present case does not conform to any of those contexts. For example, adequacy of notice is not at issue in the present case, as it was in *Dusenbery v. United States*, 534 U.S. 161 (2002), one of the most recent cases to distinguish the use of *Mathews*, which instead applied the reasonableness under the circumstances test of *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950), to determine the adequacy of the method used to give notice. The present case does not fit within any of the cases that distinguish the application of *Mathews v. Eldridge*; *Mathews* provides the appropriate cost-benefit analysis for determining whether Defendant was denied procedural due process.

The Court in *Mathews* reasoned that certain factors should be considered in the analysis of costs versus benefits: "First, the private interest that will be

affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335; see also, *e.g.*, *Gilbert v. Homar*, 520 U.S. 924, 931-32 (1997). The greater the individual's stake is in the outcome, the greater the strength of the private interest will be. *Mathews*, 424 U.S. at 335. On the opposite side of the balancing test, the Court must determine the government's interest by looking at the fiscal and administrative burdens that would ensue by use of additional or substitute procedural requirements. *Id.*

In the instant case, Defendant Daniel Barry was not afforded Procedural Due Process in the hearing on and ruling rendered against his Motion to Dismiss. The factual circumstances that support this conclusion indicate arbitrariness in the ruling to deny and a lack of application of the legal analysis required to deny a Motion to Dismiss based upon the Doctrine of Collateral Estoppel.

First, the private interests that will be affected by the official action are Defendant's liberty interests, described above. Conviction as a result of this denial of due process will result in the separation of Defendant from his children and, separately, in Defendant's incarceration.

Second, the procedures used in this case create a grave risk of erroneous deprivation of Defendant's liberty interests, a risk which could be abated considerably with additional or substitute procedural safeguards. The trial court did not exercise sound procedural safeguards in arriving at its decision to deny Defendant's Motion to Dismiss. This is evident in the Court's reliance merely upon the case of *People v. Moreno*, 744 N.E.2d 906 (Ill. App. Ct. 2001) in support of the Circuit Court's ruling

that "[p]ublic policy considerations are strong, and I think they would be violated if the State wasn't allowed to proceed on criminal cases after prior Juvenile Court proceedings. The Motion to Dismiss will be denied." (App. C, infra, at 10a).

It is striking to note that the State did not dispute that all of the elements of collateral estoppel were present in this case. In fact, the State chose to attack the application of collateral Estoppel based upon two of the recognized legal exceptions to the application of the doctrine: public policy considerations and an alleged lack of a "full and fair opportunity to litigate" the first lawsuit. In order to succeed with these exceptions to the application of Collateral Estoppel, the State has the burden to prove by clear and convincing evidence the applicability of these exceptions. RESTATEMENT (SECOND) OF JUDGEMENTS § 28(5). The trial court, in its decision, did not consider the issue of a "full and fair opportunity to litigate" the prior juvenile case. The court relied only upon the public policy exception in denying the Motion to Dismiss.

While there are public policy considerations at play in the present case, they do not satisfy the exception to collateral estoppel and in no way preclude application of that doctrine. Examples of such considerations appear in Defendant's brief to the Illinois Appellate Court. The trial court, however, did not weigh or balance any public policies, of the type later addressed by Defendant or otherwise, in any meaningful way in its ruling or at any time during the hearing. In relying on the public policy exception, the court simply applied the *Moreno* case to the present case without any consideration of the factual differences between the two cases. The court applied *Moreno* without comment as to all the public policy considerations being weighed in that case. Additionally, the court provided neither explanation nor comment to support its contention that the *Moreno* case is "on point" and similar in facts to the instant case. The trial court merely treated the *Moreno*

ruling as if it were a "bright line" rule prohibiting the application of collateral estoppel to all situations where a juvenile court case is followed by a criminal case. Such a rule is not the law of the State of Illinois.

Moreno does not represent a "bright line" rule wholly prohibiting the application of collateral estoppel to situations of a juvenile court ruling followed by a criminal case. To cite a case in support of an argument without connecting it to the present situation is flawed. Relying on this type of faulty reasoning in arriving at the decision to deny the Motion to Dismiss amounts to an arbitrary ruling without reason. Defendant analyzed the *Moreno* case in his Supplemental Memorandum in Support of Defendant's Motion to Dismiss, and while Defendant demonstrated how *Moreno* is highly distinguishable from the present case and is not controlling, (R. at C.132), none of the many differences pointed out by the Defendant were addressed by the trial court or by the State. Nevertheless, the court concluded that *Moreno* is both "on point" and "controlling." (R. at C.206).

The only explanation that the trial court gave for the ruling is that the court agrees with the ruling of the court in *Moreno*. No treatment of the public policy considerations can be found within the court's oral ruling or within the State's Motion to Deny Defendant's Motion to Dismiss, upon which the court relied. Had the State pled or argued any clear reasons that the present case and *Moreno* are similar enough to cause *Moreno* to be controlling, the court might have been justified, perhaps, in ruling to deny without explanation, as there would be an abundance of record evidence available to understand the ruling. However, the court did not have such a luxury in the present case, as is evident from the State's one-page, conclusory response to the Motion to Dismiss. (R. at C.126, C.146).

The trial court's ruling evinces a lack of procedural protection for the Defendant and creates a grave risk of error. If a trial court is allowed to rule

without explanation and without any support, reviewing courts will be forced to rely on what the trial judge was thinking rather than what the trial judge stated. If the standard of review is in any way deferential, the reviewing court will be forced to assume that the trial judge was thinking correctly. Regardless of the standard of review, though, a defendant will not know what it is against which he is defending himself. While the benefits to defendants would be significant, the cost or burden will be comparatively low for the court to, at the very least, expound upon why public policy considerations necessitating an exception to collateral estoppel apply to the present facts of this case.

The ruling of the trial court denying Defendant's Motion to Dismiss was also procedurally flawed in that the court rendered a ruling without requiring the State to overcome a "clear and convincing" burden of proof. As noted previously, the State offered little or no support for its conclusory theory that the *Moreno* case obviates the use of collateral estoppel in this case. This cannot be said to represent a discharge of the State's burden to prove the application of the public policy exception to collateral estoppel by clear and convincing evidence. Yet, the trial court chose to apply the same mere conclusion in denying the Motion to Dismiss. The court did not apply the burden of proof standard the State is required to meet. In fact, the court did not require the State to offer even a scintilla of evidence in support of its allegation that the public policy exception to collateral estoppel applies. Again as stated above, the court could have, at the very least, rendered a ruling which explained some factual nexus between the instant case and the *Moreno* case. To the contrary, the Court merely stated that *Moreno* is "on point" and "controlling". (R. at C.206).

As a result of these procedural failures in the trial court, Defendant was denied his right to procedural due process. Moreover, because this issue pertains to the legitimacy of the law enforcement practices of several

states and the protections afforded similarly situated defendants in those jurisdictions, it is urgent that this Court review the opinion and judgment below.

CONCLUSION

For the foregoing reasons, Petitioner Daniel G. Barry respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court, Second District.

Respectfully submitted,

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APPENDIX

APPENDIX A.
SUMMARY ORDER OF THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

No. 2–01–0497

THE PEOPLE OF THE
STATE OF ILLINOIS,
Plaintiff - Appellee,

v.

DANIEL G. BARRY
Defendant - Appellant.

[Entered July 25, 2002]

SUMMARY ORDER

Defendant, Daniel Barry, appeals from the trial court's denial of his motion to dismiss indictment. We affirm.

On November 24, 1999, defendant was charged by indictment with aggravated battery, in that he twisted the knee of his son, Theodore, and broke Theodore's leg. Several weeks later, the State filed an abuse petition, alleging that Theodore was an abused child pursuant to 705 ILCS 405/2-3(1) (West 1998). The petition alleged that defendant "inflict[ed] upon the minor physical injury, by other than accidental means," in that he pulled Theodore out of bed and broke his leg, placing

Theodore at risk of harm. Neglect petitions were also filed in relation to Theodore's six siblings. The State subsequently procured a superseding bill of indictment charging defendant with aggravated battery of a child (720 ILCS 5/12-4.3 (West 1998)) on February 9, 2000.

In November 2000, defendant moved for summary judgment on the abuse petition. This motion was denied on December 21. On that same date, the State amended the abuse petition to a neglect petition, alleging an injurious environment in that Theodore and four of his siblings, all of whom were "special needs children," were left in the sole care of defendant, who had "mental health problems at the time," and defendant pulled Theodore from the bed by his leg, causing the leg to break and placing Theodore at risk of harm. See 705 ILCS 405/2-3(1) (b) (West 1998). The State also dismissed two of the neglect petitions regarding Theodore's siblings. Defendant and his wife stipulated to the neglect petitions, and Theodore and four of his siblings were adjudicated neglected and declared wards of the court. Defendant then filed a motion to dismiss the indictment against him on the ground of collateral estoppel. The trial court denied the motion, and this appeal followed.

We first address defendant's motion to strike the State's brief for supposedly raising for the first time on appeal arguments regarding elements of collateral estoppel. The State's motion to deny defendant's motion to dismiss, filed in the trial court, clearly raised the argument that the elements of collateral estoppel, discussed below, were not met. Therefore, we find no merit to defendant's motion to strike and deny said motion.

Defendant contends that the trial court erred in denying his motion to dismiss. Whether a trial court has properly ruled on a motion to dismiss indictment is a question of law. *People v. Blaylock*, 311 Ill. App. 3d 399, 404 (2000). As such, we give the issue a *de novo* review. See *People v. Norris*, 328 Ill. App. 3d 994, 997 (2002).

Defendant argues that the doctrine of collateral

estoppel barred the State from prosecuting the criminal charges against him. Collateral Estoppel bars relitigation of an issue of ultimate fact that has been decided by a valid and final judgment. *People v. Terrell*, 185 Ill. 2d 467, 501 (1998). The primary purpose of this doctrine in the criminal realm is to protect an accused from the unfairness of having to relitigate, in a second proceeding, an issue that has already been decided in his favor by a verdict of acquittal. *Terrell*, 185 Ill. 2d at 501. The party seeking to invoke this doctrine must show that: (1) the issue decided in the prior proceeding is identical to the issue in the suit in question; (2) there was a final judgment on the merits in the prior proceeding; and (3) the party against whom estoppel is asserted was a party or in privity with a party to the prior adjudication. *People v. Pawlaczyk*, 189 Ill. 2d 177, 189 (2000). In order for collateral estoppel to apply, the court must be assured that the party to be estopped previously had a full and fair opportunity to litigate the issue and would suffer no unfairness as a result of the imposition of the doctrine. *Pawlaczyk*, 189 Ill. 2d at 189. Furthermore, this doctrine only applies to controlling facts or questions material to the determination of both causes, and a prior judgment only operates as an estoppel as to the point or question actually litigated and determined. *Anderson v. Financial Matters, Inc.*, 285 Ill. App. 3d 123, 131 (1996). The decision to apply collateral estoppel is entrusted to the sound discretion of the trial court and will not be reversed absent a misapplication of that discretion. *Pawlaczyk*, 189 Ill. 2d at 189.

Instead of presenting argument as to how the elements of collateral estoppel have been established in this case, defendant presents a series of arguments regarding various public policies that, according to defendant, the trial court needed to apply and reconcile. According to defendant this was done because the court's ruling on the motion to dismiss "was supported only by public policy considerations." However, we are not limited to addressing the issues as framed by the

appellant. This court may affirm on any basis found in the record. *Peerless Enterprise, Inc. v. Kruse*, 317 Ill. App. 3d 133, 141 (2000). Our review of the record reveals that the elements of collateral estoppel were not met in this case, and no issues of public policy need be addressed.

Defendant was charged with aggravated battery of a child in that he, being:

"[A] person over the age of 18 years, knowingly caused great bodily harm to Theodore Barry, a child under the age of 13 years, by twisting Theodore Barry's leg [,] causing him to suffer a fracture of the right tibia ***."

There was no adjudication in defendant's favor in any prior proceeding on any issue raised in the indictment. The trial court denied defendant's motion for summary judgment on the abuse petition. The neglect petition, to which defendant stipulated, was adjudicated in favor of the State. If anything, defendant's stipulation to the neglect petition would estop *him* from claiming that he did not break Theodore's leg. Defendant has failed to demonstrate that collateral estoppel applied in this case. Therefore, the trial court did not err in denying defendant's motion to dismiss the indictment.

For these reasons, the judgment of the circuit court of Winnebago County is affirmed in accordance with Supreme Court Rule 23(c) (6) (166 Ill. 2d R. 23 (c) (6)).

Affirmed.

McLAREN, J., with HUTCHINSON, P.J., and CALLUM, J., concurring.

APPENDIX B.
ORDER OF THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT, DENYING REHEARING

STATE OF ILLINOIS APPELLATE COURT
SECOND DISTRICT

OFFICE OF THE CLERK
APPELLATE COURT BUILDING
55 SYMPHONY WAY
ELGIN, ILLINOIS 60120-5558
847/695-3750
847/695-0092 TDD

Appeal from the Circuit Court of County of Winnebago
Trial Court No.: 99CF2937

THE COURT HAS THIS DAY, 10/09/02, ENTERED THE FOLLOWING ORDER IN THE CASE OF:
Gen. No.: 2-01-0497
People v. Barry, Daniel G.

Upon consideration of the petition for rehearing filed by appellant, the petition for rehearing is hereby denied.
(McLaren, Hutchinson, Callum, JJ.)

Robert J. Mangan
Clerk

cc: Business Legal Services, LLC
Michael L. Flynn
Roberto T. Tirona
Allan J. Franowsky
Honorable Paul A. Logli
Martin P. Moltz, Deputy Director
Paul Benjamin Linton

APPENDIX C.
ORDER OF THE ILLINOIS SUPREME COURT DENYING APPEAL AS A MATTER OF RIGHT AND DENYING LEAVE TO APPEAL

95160 SUPREME COURT OF ILLINOIS
CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

February 5, 2003

Mr. Michael L. Flynn
Business Legal Services, LLC
936 Maple Ave.
Downers Grove, IL 60515

No. 95160 - People State of Illinois, respondent, v. Daniel G. Barry, petitioner. Leave to appeal, Appellate Court, Second District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 2003.

APPENDIX D.
PORTIONS OF THE RECORD RELIED UPON

STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE
17TH JUDICIAL CIRCUIT
COUNTY OF WINNEBAGO

No. 99-CF-2937

THE PEOPLE OF THE
STATE OF ILLINOIS,

v.

DANIEL G. BARRY
Defendant.

[Filed May 31, 2001]

REPORT OF PROCEEDINGS at the hearing of the above-entitled cause before the Honorable ROSEMARY COLLINS, Judge of said Court, at Rockford, Winnebago County, Illinois, and heard on the 2nd day of May A.D., 2001.

APPEARANCES:
ATTORNEYS TIMOTHY WHITHAM
AND PAMELA WELLS appeared on
Behalf of the People.

ATTORNEY MICHAEL FLYNN appeared on
behalf of the Defendant.

Carrie L. Williams, CSR, RPR

Lic. No. 084-003625
400 West State Street
4th Floor
Rockford, IL 61101

THE COURT: This is People versus Daniel Barry, 99-CF-2937.

(Whereupon the defendant is present in open court with counsel.)

THE COURT: Counsel, you can remain seated for the argument, or not seated, but at the counsel table. I can hear you from there.

We're here on the defendant's Motion to Dismiss. If you have argument, then you are welcome to make it. Your client, does he wish to be seated next to you?

THE DEFENDANT: Thank you, Your Honor.

MR. FLYNN: Your Honor, I've submitted a – the motion itself, a memorandum in support of the motion, and when I was made aware of an additional case, a supplemental to the memorandum.

At the expense of just being repetitious, I believe everything I have to say is included in those documents itself. Yesterday, at approximately noon, I did receive the State's response, and I would like to reserve the opportunity of responding to that, if the State does not discuss the matter.

THE COURT: Okay. State?

MR. WHITHAM: Morning, Your Honor. We have filed our response with case law attached to the Court. The issue has come up as to collateral estoppel.

This, according to a First District case, which has just recently been decided in February of this year at the Appellate Court level, is actually a case of first impression in Illinois. According to that case, on these factual issues of an adjudication or a juvenile hearing taking place and then stopping the criminal trial, the First District Court held that the criminal trial could not be stopped, that it could still go forward, even if there was no finding in the Juvenile Court, even with the

lesser grounds in a Juvenile Court being a civil proceeding, that it would only be a preponderance of the evidence.

I believe that that case speaks fully to our position in this case. I believe that to argue it would be in a way stating exactly what that case states. I believe that it is grounded fairly well in its areas of estoppel in that, one, the issues were never decided specifically to the criminal case; two, the purposes of the Juvenile Court versus the Criminal Court are very different.

The Juvenile Court is to ensure welfare and protection of the child, as stated by the statute in the Juvenile Court Act, and the purpose of the criminal law is to forbid and prevent criminal activity and prescribe the appropriate punishment as stated in the criminal law.

I believe it would also be against public policy, as stated in the case of *People v. Moreno*, again out of the First District, 744 Northeast 2d 906, which would state that if this were allowed, then the State would be in a position to, in some way, not take care of the child while it's in juvenile proceeding with that petition and instead have to elect with either going with a criminal or going with a juvenile petition during that time and thus delay what the Juvenile Court Act is set up to do, and that is to somehow have the immediacy of that child and his going back to his family or in some way getting the family help that they need.

I believe *People v. Moreno* states the case, and also is precedent here that, in fact, the Defendant's Motion to dismiss should be denied based on those grounds.

THE COURT: Thank you. Anything further then?

MR. FLYNN: Your Honor, counsel is correct. The *Moreno* case is a case that goes to the issue of public policy, and that's exactly what that does.

It doesn't, and I do not see here, any basis whatsoever on which the threshold requirements established by the U.S. and Illinois Supreme Courts as to the three-prong test is being challenged. It appears to

come down, at least according to the State's response here, to an argument of public policy.

With regards to the *Moreno* case, I believe I adequately identified and distinguished what was different between those two matters. In this particular case the State brought, on the juvenile side, the State brought an abuse proceeding. On the civil (sic) side, it is an aggravated battery to child and battery thing in itself.

In both instances, you have to prove intent, and there is not one piece of evidence whatsoever that goes to the issue of intent. The State has had a full and fair opportunity to litigate the matter.

The U.S. and Illinois Supreme Courts do not say that you have to have a formal hearing. They say you have to have a full and fair opportunity. The full and fair opportunity was there. I believe it's all adequately discussed in my pleadings, and I'll stand on my pleadings, Your Honor.

THE COURT: I would like to thank both the attorneys for the documents they've provided to the Court and their pleadings. They were quite interesting to read. It's an interesting issue.

The Court will deny the defendant's Motion to Dismiss. I do find *People versus Moreno* is a controlling case and is on point. I do believe that the issues are distinctly different than those issues served through Juvenile Court, and the purposes of the Juvenile Court are different from Criminal Court.

Public policy considerations are strong, and I think they would be violated if the State wasn't allowed to proceed on criminal cases after prior Juvenile Court proceedings. The Motion to Dismiss will be denied.

MR. FLYNN: Your Honor, I have a motion here to stay trial pending appeal instanter.

THE COURT: State, do you have any comment?

MR. WHITHAM: Your Honor, I believe that the case law provided to the Court would be the precedent holding; however, it's not from this district. We would object to the appeal at this time, just based on the fact

that we are preparing for trial and ready for trial this coming Monday. I understand it's the defendant's right to file these appeals. I would just object.

THE COURT: The Court will deny your Motion to Stay Trial Pending Appeal Instanter of this issue.

This can be brought up on appeal, but I will not stay the trial proceedings pending any appeal in the middle of the trial or the middle of the case proceedings. This case is set for trial on Monday morning. Are you ready to proceed?

MR. FLYNN: Yes and no, Your Honor. I am ready to proceed, but we have not had a pretrial yet, nor has my Motions in Liminie been responded to in any sort of way.

[The Court, Mr. Flynn, and Mr. Whitham then discussed arrangements for the final pretrial hearing other trial preparations.]